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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT E. BADHAM, *et al.*,

Appellants,

v.

MARCH FONG EU, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLANTS' RESPONSE TO APPELLEES' SUPPLEMENTAL MEMORANDA

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10 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
APPELLANTS' RESPONSE TO APPELLEES' SUPPLEMENTAL MEMORANDA	1
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:	Page
Davis v. Bandemer, 478 U.S. 109 (1986)	4,5,6
Thornburg v. Gingles, 478 U.S. 30 (1986)	4
STATUTES:	
California Elections Code 30030, *et seq.*, Stats. 1983, C.6, sec. 3, 1st Ex. Sess. ("A.B. 2X")	3
OTHER:	
New York Times, Nov. 25, 1988, p. A20, col. 3 ...	5
Statistical Abstract of the United States 1988	5

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APPELLANTS' RESPONSE TO APPELLEES' SUPPLEMENTAL MEMORANDA

In its majority decision below, the district court granted with prejudice a motion to dismiss a complaint challenging the egregious gerrymandering of California's congressional districts, without giving the plaintiffs—Appellants here—any opportunity to prove violations of their fundamental constitutional voting rights. The Appellees' Supplemental Memoranda make numerous factual assertions that seek to controvert the allegations of the Complaint and are improperly presented in review of the propriety of dismissal. Appellees seek to obscure a stark reality. Since the

gerrymander took effect, California voters have participated in 180 separate congressional elections. Since the 1982 elections, however, only one congressional district has changed partisan hands.[1]

The Appellees' discussion of District Judge Schnacke's dissenting opinion seeks to trivialize his recognition that the Complaint alleges that congressional election results in California are predetermined as a result of the gerrymander. Appellees' response appears to be "So What? So what if a computer-generated gerrymander can preordain what the congressional election results will be throughout the decade?" The simple answer is that the essence of representative democracy is undermined.

Since this Court granted the Petition for Rehearing in light of the filing of dissenting Judge Schnacke's opinion and separate form of judgment, the 1988 congressional elections have occurred in California. The results substantiate and underscore the seriousness of the allegations of Appellants' Complaint. The 1988 results (see Delegation's Supplemental Memorandum at 1a) emphasize dramatically that the gerrymander of California's 45 congressional districts remains as politically potent—and constitutionally repugnant —towards the end of the decade as it was at the beginning. Not a single seat changed hands and the margins of victory were overwhelming. This was no surprise.

In their Complaint, Appellants alleged, in part, that

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[1] Even that maverick election, which occurred in 1984, is explainable. It was won by a former Republican Congressman whose 1980 district had been dismembered by the 1982 gerrymander; he moved his home to a new district, ran and won in 1984. Complaint, para.26, Jurisdictional Statement App. at 49a.

> . . .A.B. 2X is an intentional, invidious and effective gerrymander designed and functioning to dilute, minimize and/or cancel out the votes and voting strength of Republican voters across the state including plaintiffs and denies Republican voters including plaintiffs their right to fair and effective representation. . . . A.B.2X carves up the state in such a way as to allocate congressional districts to Democrats in numbers far in excess of Democratic voting strength, and to Republicans in numbers far below Republican voting strength. The effect is to control and distort the composition of California's Congressional Delegation throughout the 1980s.

Jurisdictional Statement at 41a.

The 1988 election results confirm that, just as in each congressional election since 1982, the gerrymander has preordained the outcome of the congressional election process. Of the 45 congressional races held in California in 1988, 42 of the 45 races were won by margins of greater than 20 percentage points. On average, each of these 42 candidates won with 72.8 percent of the two-party vote, a margin of 44 percentage points.[2] These dramatic figures provide strong support for the allegations made in the Appellants'

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[2] Based on the figures in the Delegation's Supplemental Memorandum at 1a - 4a. The Delegation attempts to distort the election results with a confusing amalgam of figures and theories in its Supplemental Memorandum, at p.8 n. 5. Even after "correcting for turnout"—whatever that might mean—the result speaks for itself. When non-contested races are eliminated, Democratic candidates received 4.2 percent more of the two-party vote than Republican candidates but nevertheless maintained a 20 percent margin in seats (60 to 40 percent).

Complaint, allegations they were never allowed to prove as they were denied a trial of their case.

Unlike *Davis* v. *Bandemer*, 478 U.S. 109 (1986), this appeal does not merely involve disproportionate results in a single, isolated election. Rather, the California congressional redistricting scheme has dictated electoral results and representation in Congress for the decade of the 1980s. Appellants submit that this persistent degradation of voting rights is the sort recognized by the Court in *Thornburg* v. *Gingles*:

> . . .[t]he *usual predictability* of the majority's success distinguishes *structural* dilution from the mere loss of an occasional election. *Cf. Davis* v. *Bandemer*, [478 U.S. 109] (1986) (opinion of White, J.).

Thornburg, 478 U.S. 30, 106 S. Ct. 2752, 2767 (1986)(emphasis added) (citations omitted). Indeed, Appellees do not and cannot deny the "usual predictability" of California's congressional election process throughout the decade. Nevertheless, the Delegation continues to argue that this case is not materially different from *Davis* v. *Bandemer*. Delegation's Supplemental Memorandum at 2. Appellants have already briefed the salient differences between the record in *Bandemer* and the allegations of the Complaint below.[3] The Delegation has chosen to ig-

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[3] *See* Appellants' Brief in Opposition to Motion of the California Democratic Congressional Delegation to Dismiss or Affirm, filed September 23, 1988. Contrary to the Delegation's claim, Judge Schnacke did not find "duration" to be the only distinction between *Bandemer* and *Badham*; he also recognized that in California "virtually all competition has been eliminated in congressional elections." Petition for Rehearing (And Related Relief) at 2a.

nore this refutation,[4] as well as the fundamental fact that while the plaintiffs in *Bandemer* actually had the opportunity to present their case at trial, the district court, majority below flatly denied appellants any day in court.[5] The three-judge court's majority opinion disposed of the Appellant's complaint on a motion to dismiss, while improperly taking judicial notice of disputed facts.[6]

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[4] The Delegation's Supplemental Memorandum does, however, make the erroneous suggestion that a substantive appeal in the Ninth Circuit is already underway. Delegation's Supplemental Memorandum at 1, n.1. Appellants' precautionary appeal in the Ninth Circuit was stayed pending this Court's action on their Jurisdictional Statement. By the terms of the stay, it was lifted automatically when this Court initially dismissed Appellants' appeal for want of jurisdiction. When this Court granted the petition for rehearing, Appellants immediately advised the Ninth Circuit and no further substantive action has been taken in that Court. No briefs have been filed by either side, nor has any briefing been scheduled.

[5] Subsequent election results also verify that the Indiana redistricting was materially different. In the first elections after redistricting in 1982, 32 Republicans and 18 Democrats were elected to the Indiana Senate, and 57 Republicans and 43 Democrats to the Indiana House of Representatives. *Statistical Abstract of the United States 1988*, p. 246. In 1988, the distribution in the Senate was 26 Republican to 24 Democratic. Even more significantly, in the Indiana House, Indiana Democrats have reached *parity* with Indiana Republicans, with 50 seats apiece. *New York Times*, Nov. 25, 1988, p. A20, col. 3. In California, by contrast, the election results have been immutable throughout the decade.

[6] Appellants do not understand the rationale for the Secretary's Brief on judicial notice of voter registration data. The brief does not address the jurisdictional issues now before this Court. Furthermore, the majority opinion below does not mention or rely upon registration data. The Secretary is also mis-

CONCLUSION

The only way to interpret Judge Poole's opinion below is that members of the major political parties of the United States can never assert rights based on the plurality decision in *Bandemer*. If that was the meaning of *Bandemer*, it has profound implications for the 1990s and beyond, since the California gerrymander will become the model for redistricting into the next century. If that was this Court's intent, it is this Court that should make that determination. The Court should note probable jurisdiction and set the case down for oral argument.

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taken as to the status of the record below. Appellants did not dispute the Secretary's registration figures but objected to judicial notice on the grounds that: (1) Appellees were attempting to use judicial notice as a basis for improper inferences to dispute the allegations of the Complaint; and (2) the Secretary's registration data were unreliable as a measure of voting strength. Although the Secretary's counsel does not recall it, on January 13, 1986, Appellants served on the Secretary (and all other parties) and filed with the Court below the documents offered as proof pertaining to the unreliability. These documents included a December 15, 1981 letter from the Secretary to Honorable Walter W. Stiern, Chairman of the Joint Legislative Budget Committee, concluding that the current method of purging voter registration rolls is "ineffective" and that the rolls contained a "significant amount of 'dead wood'." These comments were made in the Secretary's official capacity years before she decided to run for the U.S. Senate, and are completely consistent with the Secretary's comments during her Senate campaign.

Respectfully submitted,

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